

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

JOHN OLIVEIRA	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 02-303 T
	:	
JACK EVANS,	:	
GERHARD OSWALD,	:	
TOWN OFFICIALS,	:	
Defendants.	:	

**MEMORANDUM AND ORDER
GRANTING DEFENDANTS' MOTION
TO QUASH DEPOSITIONS NOTICE**

This is an action brought pursuant to 42 U.S.C. § 1983. See Amended Complaint¹ at 2. Plaintiff, proceeding pro se, alleges that Defendants, public officials of the Town of Bristol, Rhode Island ("Town"), used their authority to violate his constitutional right to equal protection and due process of law. See id. Specifically, Plaintiff claims that Defendant Jack Evans, the Town's Code Compliance Coordinator, and Defendant Gerhard Oswald, the Town's Zoning Enforcement Officer, (collectively "Defendants") denied him the right to

¹ The operative complaint in this matter is the Amended Complaint filed on September 27, 2002. See Memorandum and Order Granting Plaintiff's Second Motion to File Amended Complaint dated 10/1/02 ("Memorandum and Order dated 10/1/02") at 5 n.3. Plaintiff captioned this document "Plaintiff John Oliveira's Re-Entering His Amended Complaint Now Signed and Notarized to Comply with Rule 7(b)1 and Rule 8 and Rebutts Defendants' Objection Dated 9/20/2002 to Plaintiff's Amended Complaint." For convenience, the court identifies this document as the Amended Complaint. (Note: Paragraph 4 of the Amended Complaint was ruled surplusage by the court. See Memorandum and Order dated 10/1/02 at 3. It is, therefore, disregarded. See id.)

inspect and copy records in their possession.² See id. ¶ 2.

Before the court is Defendants' Motion to Quash Depositions Notice ("Motion to Quash"). Defendants seek to avoid their scheduled depositions which Plaintiff noticed respectively for January 13th and 15th. For the reasons which follow, the court grants the Motion to Quash.

Facts and Travel

In April of 2002, Defendants notified Plaintiff that he was in violation of the Town's zoning ordinance which regulated open air storage and also of the State Building Code. See Defendants' Memorandum of Law in Support of Motion for Summary Judgment ("Defendants' Summary Judgment Mem."), Exhibit ("Ex.") A (Letter from Defendants to Plaintiff of 4/10/02). Plaintiff contested the violations. He requested that Defendant Oswald provide him with copies of all "private complaints" which had been received by Mr. Oswald's office from March 29, 2001, to July 11, 2002. Id., Ex. E (Letter from Plaintiff to Oswald dated 7/11/02). Plaintiff repeated this request in another letter to Mr. Oswald dated August 9, 2002, and in an identically worded letter to Defendant Evans which was also dated August 9, 2002.³ See Plaintiff[']s]

² The identification of the offices held by Defendants is taken from Defendants' Memorandum of Law in Support of Motion for Summary Judgment ("Defendants' Summary Judgment Mem."). See Defendants' Summary Judgment Mem. at 1.

³ In his initial request, Plaintiff stated the time period for which records were requested as "3-29-[0]1 to July-11-02." Defendants' Summary Judgment Mem., Exhibit ("Ex.") E (Letter from Plaintiff to Oswald dated 7/11/02). In his August 9, 2002, letters to Evans and Oswald, Plaintiff states the time period as being "3/9/01 to July 11, 02." Plaintiff[']s Memorandum of Law Objection to Defendants' Motion to Quash Depositions Notices ("Plaintiff's Mem."), Ex. A (Letter from Plaintiff to Evans dated 8/9/02) and Ex. B

Memorandum of Law Objection to Defendants' Motion to Quash Depositions Notices ("Plaintiff's Mem."), Ex. B (Letter from Plaintiff to Oswald dated 8/9/02) and A (Letter from Plaintiff to Evans dated 8/9/02). Plaintiff maintains that Defendants failed to respond to these requests. See Plaintiff's Mem. at 3. The violations against Plaintiff were ultimately either dismissed voluntarily by the Town or dismissed by the Town's Municipal Court for insufficient evidence. See Defendants' Summary Judgment Mem. at 3 (citing Ex. D (Order of the Municipal Court of the Town of Bristol regarding Notice of Violation dated April 10, 2002, against Plaintiff)).

The present action was filed on July 8, 2002. See Order Denying Without Prejudice Plaintiff's Motion to Amend Complaint dated August 29, 2002, at 1. The Amended Complaint deemed operative by the court was filed on September 27, 2002. See Memorandum and Order Granting Plaintiff's Second Motion to File Amended Complaint dated 10/1/02 ("Memorandum and Order dated 10/1/02") at 5 n.3. Defendants filed a Motion for Summary Judgment on December 16, 2002.⁴ The instant Motion to

(Letter from Plaintiff to Oswald dated 8/9/02).

⁴ A motion for summary judgment was also filed by the Defendants in the related case of Oliveira v. Sales, et al., C.A. 02-383ML, on December 13, 2002. On December 19, 2002, Plaintiff filed a Motion to Stay in both this case and in C.A. 02-383ML. The Motion to Stay bore the caption of both cases. Judge Lisi subsequently granted Plaintiff a thirty day extension to file his response to the motion for summary judgment in C.A. 02-383ML. See Order denying Plaintiff's Motion to Stay dated 12/31/02. The Order which granted the extension was written on the face of the Motion to Stay in C.A. 02-383ML. As noted above, that Motion to Stay also bore the caption for C.A. 02-303T. The parties are apparently operating under the belief that the thirty day extension for Plaintiff to file his response to the Motion for Summary Judgment applies to both cases. See Defendants' Memorandum of Law in Support of Motion to Quash Depositions Notice ("Defendants' Mem.") at 1 n.1. In fact, Chief Judge Torres referred Plaintiff's

Quash was filed on January 9, 2003. A hearing on the Motion to Quash was held on January 13, and the court temporarily stayed the taking of Defendants' depositions, pending the issuance of this Memorandum and Order.

Discussion

In support of their Motion to Quash, Defendants assert that their pending Motion for Summary Judgment "raises a pure legal issue relating to whether *R.I.G.L. § 38-2-1 et seq* provides plaintiff with an adequate state law remedy." Defendants' Memorandum of Law in Support of Motion to Quash Depositions Notice ("Defendants' Mem.") at 1. They argue that "[i]f the General Law, which outlines the review procedure for individuals denied access to public documents under R.I.'s Access to Public Records statute, provides such an adequate state law remedy, then plaintiff's claim for violation of his due process rights, as a matter of law, must fail." *Id.* at 1-2. Consequently, according to Defendants, "[t]here is no factual information within the defendants' control that would have any bearing on this pure legal issue." *Id.* at 2.

Plaintiff disputes that there is a "clear issue of law" involved in the pending Motion for Summary Judgment. Plaintiff's Mem. at 2. He cites Rule 30 of the Fed. R. Civ. P., which allows for the taking of deposition upon oral examination of any person, including parties, see Fed. R. Civ. P. 30(a)(1), and asserts that Defendants are denying him

Motion to Stay for 02-303T to this Magistrate Judge on January 14, 2003. By separate order issued with this Memorandum and Order, the court denies the Motion to Stay, but grants Plaintiff a thirty day extension to respond to Defendants' Motion for Summary Judgment. Such action corresponds to the parties' present belief and is consistent with the order granted by Judge Lisi. The thirty day period commences January 17, 2003.

discovery. See Plaintiff's Mem. at 2-3. As for Defendants' argument that R.I. Gen. Laws § 38-2-1 affords him an adequate remedy at state law, Plaintiff states that Defendants failed to respond to his requests that he be allowed to copy and inspect the records. See Plaintiff's Mem. at 3 (citing Exhibits A (Letter from Plaintiff to Defendant Evans of 8/9/02), B (Letter from Plaintiff to Defendant Oswald of 8/9/02), and C (Copy of R.I. Gen. Laws § 38-2-3)). Additionally, Plaintiff maintains that he has a right to bring a § 1983 action in federal court and need not pursue his state remedies. See Plaintiff's Mem. at 3 (citing Monroe v. Pape, 365 U.S. 167, 183, 81 S.Ct. 473, 482, 5 L.Ed.2d 492 (1961), overruled in part by Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)).⁵

While Plaintiff correctly cites Rule 30 as authorizing the taking of a party's deposition, the right to take depositions is not unlimited. A court may restrict or prohibit the taking of a deposition where the party seeking the deposition fails to make a factual showing that it is likely to develop evidence of a dispute of an identified material fact. See MacKnight v. Leonard Morse Hosp., 828 F.2d 48, 50-51 (1st Cir. 1987)(finding no error in district court's refusal to allow plaintiff to conduct depositions to oppose defendants' summary judgment motion where plaintiff failed to make even a minimum showing warranting the requested discovery).

Plaintiff's assertion that Defendants failed to respond to his request for copies of the records, which for purposes

⁵ Pinpoint citation and subsequent history by the court.

of the present Motion to Quash the court assumes to be true,⁶ does not negate Defendants' contention that the pending Motion for Summary Judgment involves a pure issue of law. "[T]he existence and adequacy of the remedies provided by state statutes is a question of law, not of fact." Gudema v. Nassau County, 163 F.3d 717, 724 (2nd Cir. 1998). Rhode Island's Access to Public Records Act, R.I. Gen. Laws §§ 38-2-1 to 38-3-7, provides a procedure for ensuring review where local officials deny or fail to respond to requests for records. See R.I. Gen. Laws § 38-2-8 (1997 Reenactment).⁷ Thus,

⁶ Defendants state that Evans told Plaintiff that the records were in Evans' possession and were available for review by Plaintiff. See Defendants' Summary Judgment Mem. at 3. They allege that "[r]ather than review the documents, plaintiff brought the instant suit alleging that failure to provide the requested documents violated his right to due process." Id.

⁷ R.I. Gen. Laws § 38-2-8 provides:

38-2-8. Administrative appeals. – (a) Any person or entity denied the right to inspect a record of a public body by the custodian of the record may petition the chief administrative officer of that public body for a review of the determinations made by his or her subordinate. The chief administrative officer shall make a final determination whether or not to allow public inspection within ten (10) business days after the submission of the review petition.

(b) If the chief administrative officer determines that the record is not subject to public inspection, the person or entity seeking disclosure may file a complaint with the attorney general. The attorney general shall investigate the complaint and if the attorney general shall determine that the allegations of the complaint are meritorious, he or she may institute proceedings for injunctive or declaratory relief on behalf of the complainant in the superior court of the county where the record is maintained. Nothing within this section shall prohibit any individual or entity from retaining private counsel for the purpose of instituting proceedings for injunctive or declaratory relief in the superior court of the county where the record is maintained.

(c) The attorney general shall consider all complaints filed under this chapter to have also been filed pursuant to the provisions of § 42-46-8(a), if applicable.

Defendants' failure to respond does not affect the availability of an adequate state remedy. Indeed, such denial or refusal is the triggering circumstance for the prescribed review process. See id.

Lastly, Plaintiff's citation of Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), overruled in part by Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978),⁸ for the proposition that he need not pursue his state remedies before instituting a § 1983 action is inapposite. In Monroe, police officers, acting without either a search warrant or an arrest warrant, broke into the plaintiffs' home in the early morning hours. See 365 U.S. at 169, 81 S.Ct. at 474. The plaintiffs were routed from bed and made to stand naked in the living room while the police ransacked their home. See id. One of the plaintiffs was then taken to the police station on "'open' charges" and interrogated for ten hours about a two-day old murder. Id. He was not taken before a magistrate although one was available, and he was not allowed to call his family or an attorney. See id. In finding that the plaintiffs had a cause of action under 42 U.S.C. § 1983, the Supreme Court rejected the argument that the plaintiffs must first seek relief through an available state remedy before invoking the federal remedy. Monroe, 365 U.S. at 183, 81 S.Ct. at 482.

Here, construing the Amended Complaint liberally, Plaintiff alleges "that Defendants violated his rights under

R.I. Gen. Laws § 38-2-8 (1997 Reenactment); see also R.I. Gen. Laws § 38-2-7(b)(deeming a failure to respond within ten days to a request to inspect or copy public records to be a denial).

⁸ Full citation by the court.

the Fourteenth Amendment by not allowing him 'to inspect and copy records in Defendant[s'] possession.'" Memorandum and Order dated 10/1/02 at 3-4 (quoting Amended Complaint ¶ 2)(alteration in original). Presumably, Plaintiff is claiming a procedural due process violation based on Defendants' failure to produce the records. Even if the court assumes that Plaintiff possesses a recognizable constitutionally protected property interest in the records (an issue which is by no means clear), the deprivation by state action of a constitutionally protected property interest "is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law.*" Zinermon v. Burch, 494 U.S. 113, 125, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990). "The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process." Id. at 126, 110 S.Ct. at 983. Thus, in the instant case, whether there has been a violation of Plaintiff's constitutional right depends on whether there exists an adequate state remedy. If there is an adequate remedy, then no constitutional violation has occurred. See Hudson v. Palmer, 468 U.S. 517, 533, 104 S.Ct. 3194, 3204, 82 L.Ed.2d 393 (1984) (holding that even intentional deprivations of property do not violate the Due Process Clause provided that "adequate state post-deprivation remedies are available"); Rumford Pharmacy v. City of East Providence, 970 F.2d 996, 999 (1st Cir. 1992)("to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate").

"Unlike a procedural due process claim, in which the Court's focus is on 'how' and by what procedure the state has acted, substantive due process requires a consideration of 'what' the government has done." Aubuchon v. Massachusetts State Bldg. Code Appeals Bd., 933 F.Supp. 90, 93 (D. Mass. 1996)(citing Amsden v. Moran, 904 F.2d 748, 754 (1st Cir. 1990)). The doctrine of "substantive due process prevents 'governmental power from being used for purposes of oppression,' or 'abuse of government power that shocks the conscience,' or 'action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests.'" PFZ Props., Inc. v. Rodriguez, 928 F.2d 28, 31-32 (1st Cir. 1991)(quoting Comm. of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929, 943 (D.C. Cir. 1988)). It "protects individuals from state actions which appear shocking or violative of universal standards of decency, or those which are arbitrary and capricious." Aubuchon, 933 F.Supp. at 93 (citations and internal quotation marks omitted).

The difference between Monroe v. Pape and the instant case is that Monroe involved claims of substantive due process violations while Plaintiff's Amended Complaint, construed liberally, can only be viewed as alleging procedural due process violations. Consequently, resolution of the question of whether Plaintiff has suffered a constitutional deprivation turns upon whether an adequate post-deprivation remedy exists. While it is true that overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983, Zinermon v. Burch, 494 U.S. at 124, 110 S.Ct. at 982, this is not the case where the claim is for a violation of procedural due process, see id. at 125-26, 110 S.Ct. at 983. In such cases, "to determine whether a

constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate." Id. at 126; see also Rumford Pharmacy v. City of East Providence, 970 F.2d at 999-1000 (upholding dismissal of plaintiff's procedural due process claim where plaintiff had not alleged or discussed the unavailability of constitutionally adequate state law remedies). The egregious acts alleged in Monroe, if true, violated plaintiffs' substantive due process rights regardless of whether the state provided an available remedy. Here, in contrast, a violation of Plaintiff's right to procedural due process exists only if there is no adequate remedy under state law.

Conclusion

The court is not persuaded that Defendants' Motion for Summary Judgment does not involve a pure question of law. The court fails to see how the depositions of either Evans or Oswald could elicit any factual information which would be relevant to the determination of the legal question at issue. Accordingly, the court grants the Motion to Quash. However, in recognition of Plaintiff's pro se status and the fact that he had only a short period of time to respond to the Motion to Quash,⁹ the motion is granted without prejudice to the right of Plaintiff to present further argument in support of his contention that he should be allowed to depose Defendants. If Plaintiff does so, he should state specifically what he seeks

⁹ At the hearing on January 13, 2003, the court repeatedly told Plaintiff that it was willing to give him additional time to submit arguments as to why he should be allowed to conduct discovery and that the court would stay the taking of the depositions temporarily pending receipt of Plaintiff's additional arguments. Plaintiff rejected all of the court's offers.

to determine through the depositions and explain how such information is relevant to the determination of the pending Motion for Summary Judgment. See MacKnight v. Leonard Morse Hospital, 828 F.2d 48, 52 (1st Cir. 1987)(finding that "it was not asking too much to require plaintiff to disclose some relevant facts and [the] basis for them before the requested discovery would be allowed.").

For the reasons stated above, the court GRANTS the Motion to Quash.

So Ordered.

ENTER:

BY ORDER:

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David L. Martin
United States Magistrate Judge
January 17, 2003

Deputy Clerk